PAGE

The Oft-Repeated Contention that the Commission Tested These Rates Solely by Rates Applicable Within the North and to Allow Competition in Central Territory Markets Finds No Support in the Record 26

The Preliminary Findings of Fact Support the Ultimate Finding as to the Reasonableness of the Rates Prescribed 28

There Is No Allegation that the Commission Failed to Make Sufficient Findings 29

The Evidence Supports the Finding that the Rates Prescribed Are Substantially the Same as Those Existing Prior to the Time These Proceedings Were Instigated 30

The Evidence Supports the Finding that the Rates in Southern Territory Are On Substantially the Same Level as Those Prescribed for Application Within Central Freight Association Territory . . 31

The Evidence Supports the Commission's Finding that Transportation Conditions in Southern Territory, in so far as the Movement of This Commodity Is Concerned, Are Not so Substantially Different From Those in Central Territory as to Justify Higher Rates 33

The Finding of the Commission that Rates Higher Than Those Prescribed Would Restrict, If Not Prevent, the Movement of the Traffic, Is Supported by the Evidence 35

CONCLUSION 36

APPENDIX 37

TABLE OF CASES.

	PAGE
Arizona Grocery Co. v. A. T. & S. F. R. Co., 284 U. S. 370, 76 L. Ed. 348	23
B. & O. R. Co. v. U. S., 298 U. S. 349	24
Chicago, R. I. & P. R. Co. v. U. S., 274 U. S. 29, 71 L. Ed. 911	12
Coke from Alabama and Tennessee to Central Territory, 208 I. C. C. 281, 215 I. C. C. 384 (I. & S. 3985)	2, 4
Coke Between Points in Central and Illinois Territories, 194 I. C. C. 640 (I. & S. 3511)	3
Covington, etc., Turnpike Co. v. Sandford, 162 U. S. 578	22
Dayton Goose Creek R. Co. v. U. S., 263 U. S. 456	14
Florida v. U. S., 282 U. S. 194, 75 L. Ed. 291	18, 20
Florida v. U. S., 292 U. S. 1	18, 19
General Rate Level Investigation, 1933, 195 I. C. C. 5	22
Georgia Public Service Comm. v. U. S., 283 U. S. 765, 75 L. Ed. 1397	14
Hansen Packing Co. v. B. & O. R. Co., 201 I. C. C. 75	22
Illinois Central R. Co. v. I. C. C., 206 U. S. 441, 51 L. Ed. 1128, 75 S. Ct. Rep. 700	11, 29
I. C. C. v. Delaware, L. & W. R. Co., 220 U. S. 235, 55 L. Ed. 448	24
Louisville & Nashville R. Co. v. Garrett, 231 U. S. 298, 58 L. Ed. 229	31
Merchants Warehouse Co. v. U. S., 283 U. S. 501, 75 L. Ed. 1227	11
St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 80 L. Ed. 1033	10, 11
Smyth v. Ames, 169 U. S. 466	22
Texas & P. R. Co. v. U. S., 162 U. S. 197	14
U. S. v. Louisiana, 290 U. S. 70, 78 L. Ed. 181	18, 19
Virginian R. Co. v. U. S., 272 U. S. 658, 71 L. Ed. 463	10, 28, 29
Waste Material Dealers Asso. of Arkansas v. C. R. I. & P. R. Co., 164 I. C. C. 587	22
Western Paper Makers Co. v. U. S., 271 U. S. 268, 70 L. Ed. 941	12, 23

Table of Statutes.

	PAGE
Interstate Commerce Act (41 Stat. 474).	
Section 3	37
Section 15 (1)	37
Section 15 (7)	38
Section 15a (1)	39
Section 15a (2)	40
Section 16a	41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 638.

BALTIMORE & OHIO RAILWAY COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF FOR ALABAMA IRON & STEEL SHIPPERS CONFERENCE, APPELLEE.

REFERENCE TO THE OFFICIAL REPORT OF THE FINDINGS OF LOWER COURT AND THE INTERSTATE COMMERCE COMMISSION.

This suit was brought under the Urgent Deficiencies Act of 1913 (Chapter 38, Stat. L. 208, 220), to set aside and vacate an order of the Interstate Commerce Commission prescribing reasonable maximum rates on coke from certain points in the South, principally Birmingham, Alabama, and Chattanooga, Tennessee, to certain

points in the states of Michigan, Ohio, Illinois and Indiana, known as Central Freight Association Territory.

The suit was instituted in the United States District Court for the Northern District of Illinois, Eastern Division, and was heard by a Three Judge Court, as required by the statute.

The Court, at the conclusion of argument, dismissed the case from the bench. No opinion was rendered but the Court made its findings of fact and conclusions of law, which are found at pages 161 to 168, inclusive, of the record.

The opinions of the Interstate Commerce Commission are reported in 208 I. C. C. 281 (R. 15), and 215 I. C. C. 384 (R. 33).

STATEMENT AS TO JURISDICTION.

On January 17, 1938, the Court announced its finding that probable jurisdiction had been shown. This being a proceeding to enjoin an order of the Interstate Commerce Commission, jurisdiction is conferred by the District Court Jurisdiction Act, 38 Stat. L. 219.

STATEMENT.

This brief is filed on behalf of the Alabama Iron & Steel Shippers Conference, an association of Alabama manufacturers, producers and shippers of certain commodities including coke, which intervened in behalf of the defendants. This Association includes in its mem-

bership the Alabama By-Products Corporation, which instituted the original complaint before the Interstate Commerce Commission, attacking the rates on coke from certain Alabama points to the territory here involved. Subseqeunt to the filing of that complaint certain producers of coke in Central Freight Association territory likewise filed complaints attacking the rates from Birmingham, Ala., Chattanooga, Tenn., and Wise, Va., to that territory, and the railroads serving Central Freight Association territory filed tariffs establishing a scale of rates for application within that territory. These tariffs were suspended by the Interstate Commerce Commission and the complaints referred to were consolidated for hearing with the hearing on the suspended rates and that case was entitled "Investigation and Suspension Docket No. 3511, *Coke Between Points in Central and Illinois Territories.*"

After extensive hearings the Commission made and entered its orders in that consolidated proceeding, 194 I. C. C. 640 (R. 42), in which it was held that the rates proposed by the carriers had not been justified and the Commission prescribed a mileage scale for application in Central Freight Association territory as well as a maximum scale for application from the South to Central Freight Association territory. These scales appear as Appendix 8 to the aforesaid report of the Commission, the scale prescribing rates for application in Central Freight Association territory being known as "Column 2 Scale" and the scale which the carriers were required to observe as maximum from the South

is known as "Column 3 Scale." The Column 2 Scale was put into effect in Central Freight Association territory and the southern carriers revised such of their rates from the South as exceeded the Column 3 Scale. Subsequently, certain of the railroads operating in Central Freight Association territory, appellants here, by amendment to their concurrences, required the southern carriers to establish as minimum rates the Column 3 Scale, which had been prescribed as maximum. On petition of the southern carriers and southern shippers the rates so published were suspended by the Interstate Commerce Commission and hearing was had thereon in a proceeding known as "Investigation and Suspension Docket No. 3985, Coke from Alabama, Tennessee & Virginia to Central Territory" (R. 15). In this proceeding the order of March 11, 1935, and the order of April 30, 1936, here sought to be set aside, were made and entered. The order of March 11, 1935, which it is admitted was made after notice and full hearing was subsequently modified on petition for reconsideration and the order of April 30, 1936, was entered on the same record as the order of March 11, 1935. It is this order of April 30, 1936, that is here under attack.

The question here presented is whether the order of the Commission under attack, prescribing reasonable maximum rates on coke from certain points south of the Ohio River to points in the territory north of the Ohio River, known as Central Freight Association territory, is supported by sufficient findings which are in turn supported by substantial evidence. There is no

question presented as to the jurisdiction of the Commission as it was exercising power to prescribe just and reasonable maximum rates, specifically vested in it by Section 15 of the Interstate Commerce Act.

The rates prescribed by the Commission are on the same scale as the Commission had itself previously prescribed as reasonable maximum rates on coke for application within Central Freight Association territory. The Commission found that the rates prescribed are also on the same level as the rates voluntarily maintained on coke in the territory south of the Ohio River and are substantially the same as the rates previously voluntarily maintained from the same points of origin to certain destinations within Central Freight Association territory. The Commission also found rates made on a higher basis than prescribed would retard if not prevent the movement of the traffic.

The appellants are railroads operating in Central Freight Association territory and they insist that the Commission should have prescribed rates for application interterritorially between Southern territory and Central Freight Association territory on a higher basis than rates maintained on the same commodity in either of said territories and higher than rates previously voluntarily maintained. This claim is based on the allegation that the part of the interterritorial transportation which is rendered in Southern territory is more difficult and expensive than the transportation in Central Freight Association territory, but the Commission found that there is not sufficient difference in transportation conditions to justify higher rates. The

purpose of the appellants is, of course, to have the interterritorial rates fixed so high as to prevent the movement of the traffic, thereby confining such movement to coke produced on the lines of appellants.

The railroads originating the traffic in Southern territory and participating in the movement to Central Freight Association territory, have intervened herein, in support of the Commission's order.

In addition to the findings, above set forth, the Commission also found that rates from southern producing points, made on the same scale as rates within Central Freight Association territory, would not result in discrimination against producers in Central Freight Association territory (R. 36, 37). The finding that the prescribed rates would not result in discrimination was attacked in the court below, but that issue has apparently been abandoned here or at least is not pressed in appellants' brief.

Upon the foregoing findings of fact the Commission made its ultimate finding that the rates prescribed, being on the same level as that obtaining in both territories and not substantially higher than previously voluntarily maintained, would be just and reasonable maximum rates. We submit that the specific findings of fact, thus made, are sufficient to support the ultimate finding and order of the Commission and we shall undertake to demonstrate that these findings are not only supported by substantial evidence but by the overwhelming weight of the evidence. We shall, however, first discuss certain other questions raised by appellants.

SUMMARY OF ARGUMENT.

I.

The order of the Commission is supported by four preliminary findings of fact: (1) That the prescribed rates are not lower than those maintained in the past; (2) that the level of rates in the two territories between which the interterritorial rates were prescribed is approximately the same in each territory and the same as the interterritorial rates prescribed; (3) that the differences in transportation conditions between the haul up to the Ohio River and the haul within Central territory are not sufficiently great to require an increase in the rates for the haul up to the Ohio River; and (4) that rates higher than those prescribed as reasonable maximum rates would further restrict, if not prevent, the movement of coke from the South to Central territory. These findings of fact are supported by substantial evidence and are sufficient to support the order of the Commission.

II.

The determination whether a rate is unreasonable is a question of fact and the Court will not undertake to determine the weight of the evidence nor consider the soundness of the Commission's reasoning, nor whether its decision is consistent with previous decisions, nor the wisdom or expediency of the Commission's action.

III.

There is no merit in the claim that the Commission's order was made without notice and hearing. The order was based upon a voluminous record, made after notice to all the parties, and the sole basis for the claim that there was no notice and hearing is the fact that the Commission entered its order upon petitions for reconsideration. Section 16-a, of the Interstate Commerce Act, specifically provides for such petitions and that the Commission may, upon granting such rehearing, change or modify its orders.

IV.

The order of the Commission did not go beyond the issues, but prescribed rates in lieu of the suspended rates, a power which is specifically vested in the Commission by Sections 15 (1) and 15 (7) of the Act.

V.

The Commission did not err in considering the effect of the rates on the movement of traffic since it is specifically required to do so by the provisions of Section 15-a (2), and since such consideration is a necessary element of the determination of reasonableness of rates.

VI.

Neither the fact that the Commission reached a different conclusion from that previously reached on the same record, nor the statements made in the dis-

senting opinion, can affect the validity of the Commission's order.

VII.

The oft-repeated contention that the Commission tested these rates solely by rates applicable within the North and to allow competition in Central territory markets finds no support in the record.

VIII.

The order of the Commission prescribing reasonable maximum rates for future application having been made in the exercise of a delegated legislative power after notice and hearing, being supported by sufficient findings which in turn are supported by substantial evidence, there being no irregularity in the proceeding and no error in the application of the rules of law, the order must be sustained.

The Determination Whether a Rate Is Unreasonable Is a Question of Fact and This Court Will Not Undertake to Determine the Weight of the Evidence, nor Consider the Soundness of the Commission's Reasoning, nor Whether Its Decision Is Consistent With Previous Decisions, nor the Wisdom or Expediency of the Commission's Action.

It seems clear that this suit was instituted because the order of the Commission resulted from a change in the Commission's conclusion on the evidence as to what would constitute a reasonable rate to be exacted in the future. Throughout the pleadings and through-

out appellants' brief, it is urged, over and over again, that the Commission changed its ruling without substantial evidence to justify such change. In considering the validity of the order, however, the question is as to whether the order is supported by substantial evidence and not whether there was substantial evidence to justify the Commission in changing a conclusion previously reached on the same evidence.

In the court below appellants insisted on re-hashing the many ramifications of this whole litigation, relying upon a history of the litigation to influence the court below to review the matter on its merits, which, of course, it had no right to do and peremptorily refused to do. The order here involved is an order prescribing rates for the future and is therefore an order made in the exercise of the legislative function of the Interstate Commerce Commission (*St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38, 50, 80 L. Ed. 1033, 1040). It is well established that such orders are not reviewable on the ground that they are against the weight of the evidence, nor can the courts consider the soundness of the Commission's reasoning; or consider whether its decision was consistent with its previous decisions, or consider the wisdom or expediency of the Commission's action.

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province" (*Virginian*

R. Co. v. *U. S.*, 272 U. S. 658, 663, 71 L. Ed. 463, 467).

The reasonableness of a rate is a question of fact and the finding of the Commission thereon is conclusive unless the record establishes that clear and unmistakable error has been committed (*Illinois Central R. Co.* v. *I. C. C.*, 206 U. S. 441, 465, 51 L. Ed. 1128, 1138). The Court will not review the Commission's findings of fact by passing upon the credibility of witnesses or by weighing the testimony (*Merchants Warehouse Co.* v. *U. S.*, 283 U. S. 501, 508, 75 L. Ed. 1227, 1236). The inquiry of the Court is only for the purpose of ascertaining whether the finding of the Commission is so wanting in support by any substantial evidence as to make the action of the Commission arbitrary.

> "When the legislature appoints an agent to act within the sphere of legislative authority it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are especially applicable to such agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily (Citing Cases) * * *. In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies within the legislative agency acting within its statutory authority" (*St. Joseph Stockyards Co.* v. *U. S.*, *supra*, 51).

Nor will this Court consider the wisdom of the Commission's action:

> "If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action" (*Chicago, R. I. & P. Co.* v. *U. S.*, 274 U. S. 29, 33, 71 L. Ed. 911).

In *Western Paper Makers Co.* v. *U. S.*, 271 U. S. 268, 70 L. Ed. 941, this Court states the rule as follows:

> "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law."

The above principles of law are so well established that even appellants concede them to be controlling on page 29 of their brief, but, nevertheless, that is precisely what they would have this Court do—weigh the evidence and substitute its judgment for that of the Commission.

There Is No Basis for Claim that the Commission's Order Was Made Without Notice and Hearing.

The ultimate order of the Commission, which is here under attack, was made upon petitions for rehearing on the record before the Commission. Appellants insist that the making of this order upon petitions for reconsideration without further hearing constituted a

denial of notice and hearing. It is not denied, however, that there was a full hearing at which the record was made on which the ultimate order was based. We are at a loss to understand the ground for this contention because the Commission decided the case on the record before it and its action was the same as the action of a Court on a petition for rehearing.

Section 16-a of the Interstate Commerce Act specifically provides for petitions for rehearing and that the Commission "may reverse, change or modify" its original order on such rehearing. The section also provides that "applications for rehearing shall be governed by such general rules as the Commission may establish." It is not claimed that the petitions for reconsideration do not conform to the rules of the Commission, nor is it claimed that appellants, or any one else, petitioned for the right to introduce additional proof as the rules of the Commission provide they may do. This argument would therefore not only nullify Section 16-a of the Interstate Commerce Act, but abolish the power of tribunals generally to change their decision upon reconsideration even though the statute may, as in this case, specifically so provide.

The Order of the Commission Did Not Go Beyond the Issues Before the Commission.

Appellants contend (Br. 24) that the order of the Commission, here under attack, "transgressed appellants' rights to notice and hearing in two respects: (1) in condemning rates to points not involved in the sus-

pended schedules and in requiring that they be reduced, and (2) in affirmatively prescribing for future application rates to any points, including those involved in the suspended schedules."

Our first response to these contentions is that they are not supported by any allegation in the pleadings. In the bill of complaint no facts are set forth upon which such contentions can be made, nor is the validity of the order attacked on either of said grounds. Under well established principles the appellant will not here be heard upon an issue not raised by the pleadings. (*Texas & P. R. Co.* v. *U. S.*, 162 U. S. 197, 238; *Dayton-Goose Creek R. Co.* v. *U. S.*, 263 U. S. 456, 486).

However, there is no merit in either contention. The first contention that the order of the Commission condemned rates not involved in the suspended schedules and required that they be reduced is apparently predicated upon the language of the Commission's order which required the publication, from certain designated points in the South "to destinations in Illinois, Indiana, Ohio and the Lower Peninsula of Michigan, rates which shall not exceed those set forth in the appendix to said report * * *."

The contention seems to be that because the Commission did not specify the many hundreds of points in the order such order must therefore be construed to cover points not before the Commission in the proceeding. However, not only must an order of the Commission always be read in the light of its report (*Ga. Public Service Comm.* v. *U. S.*, 283 U. S. 765, 771, 75 L. Ed. 1397, 1403), but here the report of the Com-

mission is *expressly* "referred to and made a part of" the order (R. 39). Moreover the report clearly shows that the Commission was considering "*schedules filed to become effective May 1 and August 3, 1934,* by which respondents proposed to increase the rates on coke from the Birmingham, Ala., district, hereinafter referred to as Birmingham, and from origins on the lines of the Louisville & Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., and to make reductions and increases in rates from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio and the Lower Peninsula of Michigan" (R. 34). The language "to destinations in Illinois, Indiana, Ohio and the Lower Peninsula of Michigan" is exactly the same as that used in the Commission's order in Docket No. 3511, upon which appellants insist they stand (R. 126). Also in the order in Docket No. 3511, prescribing rates for application in Illinois and Central territories, the order says: "Between points in the territories considered in the said report" (R. 128), without designating the points. There, as here, however, the specific points are designated in the report as being the points to which rates are published in the suspended schedules. It is apparent that the contention here made is an afterthought and is without any merit whatsoever.

There is an equal lack of merit in the second contention, which is that the Commission was without authority to prescribe rates for future application in lieu of the suspended rates which the Commission condemned. The statutes quoted by appellant clearly

vest this power in the Commission. We reproduce extracts from the Act as quoted by the appellants on pages 21 and 22 of their brief:

"Thus, the portion of the Act dealing with the suspension of tariffs (Section 15 (7)) provides:

> "'Whenever there shall be filed with the Commission any schedule stating a new * * * rate, * * * the commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate * * * and after full hearing, * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective * * *.'

"Similarly, the section of the Act which gives the Commission its power to prescribe rates, Section 15 (1), provides:

> "'Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate * * * demanded, charged, or collected * * * is or will be unjust or unreasonable or unjustly discriminatory * * * the Commission is hereby authorized and empowered to determine and prescribe what

will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *.'"

It will be seen that the Commission is expressly empowered in a suspension proceeding, such as that here involved, to "enter upon a hearing concerning the lawfulness of such rate * * * and after full hearing * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective * * *." "A proceeding initiated after it had become effective" would be either upon complaint or upon investigation ordered by the Commission itself and Section 15 (1) specifically provides that in such a proceeding "the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *."

The Commission Did Not Err in Considering the Effect of Rates on the Movement of Traffic.

It is urged by appellants that the Commission had no right, in a case such as this, to consider the effect of rates on the movement of traffic, and that inasmuch as its conclusion and order are based, at least in part, on such consideration they must be set aside by the Court. The basis for the argument that the Commission was without power to consider the effect upon the movement of traffic is apparently the contention that Section 15-a (2) of the Interstate Commerce Act, which specifically

requires the Commission to consider the effect of rates on the movement of traffic "is only intended to be used in broad revenue cases dealing with the entire body of rates of a large group of carriers or all of the carriers of the country, and not with the rates of a limited number of carriers and on just one commodity" (Br. 57). This novel contention finds no support in the language of the Act itself, which is "in the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of the rates on the movement of traffic * * *."

In support of the contention that there must be read into the Act a condition that it shall apply only "in broad revenue cases dealing with the entire body of rates of a large group of carriers or all of the carriers of the country" appellants rely upon the cases of *U. S.* v. *Louisiana*, 290 U. S. 70, 78 L. Ed. 181; *Florida* v. *U. S.*, 292 U. S. 1, and certain language in the Forty-sixth Annual Report of the Interstate Commerce Commission to the Congress.

The Louisiana case involved the power of the Commission to require the level of intrastate freight rates to be increased to the level of interstate rates prescribed by the Commission in a general case involving the level of all interstate rates. Reliance was there had upon the case of *Florida* v. *U. S.*, 282 U. S. 194, 75 L. Ed. 291, where this Court had set aside an order of the Interstate Commerce Commission as to intrastate rates. Both of these cases arose under the old Section 15-a, which was purely a revenue section and did not

contain the present rule of rate-making, as provided by the amendment. But under the old Section 15-a, in holding that the Florida case had no application, this Court said (290 U. S. 70, 79):

> "A question different from that before us was presented in Florida v. United States, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119, *supra*. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by section 15-a. The court was careful to point out that the Commission had undertaken to establish a state-wide level of intrastate rates without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce involved."

It will be noted that this Court held that the Florida case was essentially one of undue prejudice against shippers, involving only one railroad and one commodity. We submit that the statement of the Court that "it was not the general revenue proceeding authorized by Section 15-a" is far from a holding by this Court that the provisions of the then Section 15-a were not to be observed by the Interstate Commerce Commission except in a so-called general revenue case. Nor can anything be found in *Florida v. U. S.*, 292 U. S. 1, which was the second consideration

by this Court of that case, that in any way supports the contention that the requirements of Section 15-a are to be observed only in general revenue cases.

It is to be remembered that after the first decision of this Court in the Florida case, the Interstate Commerce Commission held a further hearing and made the finding that the intrastate rates created "unjust discrimination against interstate or foreign commerce" as distinguished between unjust discrimination between persons and localities. Thus the second case was a revenue case and the Commission held that the intrastate rates put a revenue burden upon interstate commerce, and in sustaining the Commissions orders this Court in effect held that the provisions of Section 15-a as changed since the decision in the first Florida case, were applicable, and that properly construed the change had not affected the power of the Commission to regulate intrastate rates. Thus it is that this Court held the provisions of 15-a, as amended, were applicable in a case involving "only one railroad and one commodity."

As to the Forty-sixth Report of the Interstate Commerce Commission to the Congress, the Commission simply asked the Congress to amend Section 15-a as it then stood by eliminating the recapture provisions and providing a new rule for rate-making "to make it clear that in regulating the general level of rates, fares and charges the Commission shall, among other things, be guided by the need for producing, as far as possible, revenues which will be sufficient for the maintenance of an adequate national railway transportation

system, and also to recognize the principle that the railroads may justly earn a surplus in times of prosperity as a safe-guard against deficiency in times of depression." It will be noted that there is here no reference to the provision which Congress put in the amended Section 15-a as to giving consideration "to the effect of rates on the movement of traffic." The reference to "regulating the general level of rates" does not necessarily or at all mean that the rule of rate-making requested should be applied only in cases involving the general level of rates, because in prescribing rates on individual commodities the Commission is likewise regulating the general level of rates.

If the provision in Section 15-a, requiring the Commission to give consideration to the effect on the movement of the traffic, is to have no application except "in broad revenue cases dealing with the entire body of rates of a large group of carriers or all of the carriers of the country" then the other provisions of Section 15-a, among them the provisions requiring the Commission to give consideration "to the need of revenue" of the carriers, likewise have no application except in such cases. It is quite certain that appellants in this case would object to a ruling by this Court that in cases involving the rates on one commodity the Commission should not give any consideration to the revenue needs of the carriers.

Entirely aside from the provisions of Section 15-a, however, the value of the service and the effect upon the movement of traffic have always been matters for consideration in prescribing just and reasonable rates.

In fact the two fundamental considerations have always been "the cost and the value of the service." The value of the service is measured by whether the transportation service adds as much to the value of the product as it costs to ship it and whether commodities will freely move. These principles have been announced and applied over a long period of years, not only by the Interstate Commerce Commission but by this Court. To cite only a few cases we refer to *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466; *General Rate Level Investigation, 1933*, 195 I. C. C. 5, 61; *Waste Material Dealers Asso. of Arkansas* v. *C. R. I. & P. Ry. Co.*, 164 I. C. C. 587, 599; *Hansen Packing Co.* v. *B. & O. R. Co.*, 201 I. C. C. 75, 77.

There Is No Merit in the Contention that the Order Is Unlawful Because It Constitutes a Change in the Commission's Previous Rulings.

It is repeatedly alleged in the bill that the scale of rates prescribed by the Commission in the order under attack was the "third successive lower basis prescribed by the Commission" and that as the Commission changed its opinion without additional evidence the order is void. In the first place, it is not true that the order was the "third successive lower basis prescribed by the Commission." The first scale prescribed by the Commission as a maximum scale was higher than the rates previously in effect and while the scale prescribed by the order under attack

is lower than the two scales previously authorized, it is not lower than the rates in effect before the Commission took any action.

However, in prescribing rates for the future the Commission may change the rates as prescribed as often as occasion may require and on the same or additional evidence. The power of the Commission to so change rates for future application and the distinction between this power and the judicial function were clearly defined in the case of *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370, 76 L. Ed. 348.

The fact that the findings are inconsistent with the conclusions reached by the Commission in similar cases or with views expressed in reports in the same case do not invalidate the order. In *Western Paper Makers Chemical Co.* v. *U. S.*, 271 U. S. 268, 70 L. Ed. 941, this Court said:

> "The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. It was urged that these are inconsistent with conclusions reached by it in similar cases; that the findings are inconsistent with some views expressed in its reports in this proceeding; that some evidence was improperly considered; and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss * * *. In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence" (269).

Statements Made in the Dissenting Opinion Afford No Legal Grounds for Attacking the Order of the Interstate Commerce Commission.

Much reliance is had here upon statements made in the dissenting opinion by Commissioner Meyer. This Court has several times pointed out that reliance cannot be had upon the reasons given or facts found in dissenting opinions to overturn orders of the Commission. In *I. C. C.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. 448, it was said (251):

> "This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members * * * proceeded upon premises of fact, which, however, cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission."

In the more recent case of *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, decided May 18, 1936, this Court stated:

> "The wide difference of opinion among the members may suggest doubt as to some basic findings of fact, but it gives no support to appellants' claim that the commission acted arbitrarily or in excess of powers granted by the Act. The legal effect of the challenged report and order is the

same as if supported by all members of the commission."

It is therefore submitted that under the law, as laid down by this Court, reliance cannot here be had upon a dissenting opinion.

The Order of the Commission Is Not an Attempt to Equalize Disadvantages of Geographical Location, Opportunities or Abilities.

It is contended that the order of the Commission was unreasonable because it sought to equalize disadvantages of fortunes, opportunities, and geographical location. There is nothing in the Commission's report or in the record to support this allegation; in fact, quite the contrary appears. Had the Commission undertaken to equalize disadvantages of geographical locations, opportunities, fortunes or abilities it would have prescribed rates from the South to the North on a lower basis than obtains within the North. The only natural disadvantage under which the southern shippers labor is the fact that they are more distant from the market. Surely nothing is done to equalize this disadvantage when the more distant shipper is required to pay rates made on the same scale as his more favorably located short-haul competitor. It may be contended that in addition to the natural disadvantage of distance the southern shipper also has the disadvantage of adverse transportation conditions, but the Commission found that the traffic here in question moved over the main lines of the railroads reaching

the Ohio River and that all traffic from the South to Central Territory or the Northwest moves over these lines, and further that the revenue net tons per mile of road transported by one of the principal carriers handling this traffic exceeds that of the principal carriers in Central territory (R. 35, 36). These findings of the Commission are amply supported by the record, as we shall later show, and, in fact, the record establishes that the cost of transportation within the South is less per unit of traffic handled than in Central territory. Certainly the Commission cannot fairly be charged with any desire to favor the traffic from the South or to equalize disadvantages of geographical locations because in the light of the evidence above referred to it prescribed rates not lower, distance considered, but the same as obtained in Official Classification territory. The Commission refused and still refuses to equalize the disadvantages of geographical location, opportunities and abilities, and only when confronted by overwhelming evidence did it prescribe an equal basis of rates.

The Oft-Repeated Contention that the Commission Tested These Rates Solely by Rates Applicable Within the North and to Allow Competition in Central Territory Markets Finds No Support in the Record.

It is claimed that the Commission failed to use customary standards of rate-making, that it tested the rate solely by the level of rates applicable within the North and to enable southern shippers to compete

therein. There is no basis for any of these allegations except the conclusion of the pleader and perhaps the dissenting opinion of Mr. Commissioner Meyer (R. 37, 38). These assertions come squarely in conflict with the Commission's own statement of the grounds for its action. The Commission refused to test the rates from the South solely on the level of the rates applicable within the North, but did finally base its conclusion, in large part, on the double consideration of rates voluntarily maintained in the South and rates prescribed by it in the North. After finding that the rates within the South and the rates within the North were on approximately the same level, the Commission prescribed that level for the interterritorial rates. In its first report the Commission failed to give due weight to the fact that the level of the coke rates in the South was approximately the same as in the North (R. 26), but on reconsideration it did give weight to the existence of this fact (R. 35, 36), and prescribed interterritorial rates on the basis prevailing within each of the territories.

In addition to the level of the intraterritorial rates in both territories the Commission, as we have seen, gave consideration to other pertinent facts, such as the level of the rates previously voluntarily maintained and the effect of higher rates on the movement of the traffic.

The Preliminary Findings of Fact Support the Ultimate Finding as to the Reasonableness of the Rates Prescribed.

We therefore have here four preliminary findings of fact upon which the ultimate finding of fact as to the reasonableness of future rates was based and appellants have not been able to show any substantial evidence militating against these findings: (1) That the prescribed rates are not lower than those maintained in the past; (2) that the level of rates in the two territories between which the interterritorial rates were prescribed was approximately the same in each territory and the same as the interterritorial rates prescribed; (3) that the differences in transportation conditions between the haul up to the Ohio River and the haul within Central territory were not sufficiently great to require an increase in the rates for the haul up to the Ohio River; and (4) that rates higher than those prescribed as reasonable maximum rates would further restrict, if not prevent, the movement of coke from the South to Central territory.

While the foregoing preliminary findings of fact sustain the ultimate finding as to the reasonableness of the rates prescribed, yet the finding as to such reasonableness is itself a finding of fact, and if supported by substantial evidence other than the evidence sustaining the preliminary findings, such ultimate finding cannot be set aside by the Court. In *Virginia Ry. Co.* v. *United States, supra,* the Court said (665):

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *I. C. Ry. Co.* v. *I. C. C.*, 206 U. S. 441, 454, 51 L. Ed. 1128, 1133, 27 S. Ct. Rep. 700."

The record before the Commission consists of 582 pages of transcript of oral evidence, together with 83 exhibits, some of which are quite voluminous. This Court cannot be expected to search this record in order to resolve opposing contentions as to what it shows, but it is not necessary to do this in order to ascertain that there is substantial evidence to sustain the Commission's ultimate finding of fact as to the reasonableness of rates for future application.

There Is No Allegation that the Commission Failed to Make Sufficient Findings.

By its assignment of errors to the court below, appellants, for the first time, raised the question as to the sufficiency of the Commission's findings. The only allegation in the bill of any lack of sufficient findings is contained in Section 8, of paragraph 7 of the Bill (R. 13), and relates only to the alleged "conclusion" of the Commission that the basis prescribed in previous orders had become unreasonable. But the Commission was not called upon to make any findings as to its previous orders, and made none. It was only called upon to make necessary findings to support the rates it prescribed for future application. There is there-

fore a total lack of any allegation as to insufficiency of findings and that question is not before the Court.

Although appellants argue at some length that the order of the Commission is void because not supported by sufficient findings, and quote from numerous cases holding that an order will be set aside unless supported by findings of the basic or jurisdictional facts, they no where pointed out what findings are lacking. We have already pointed out the findings that were made and we submit that they are sufficient to support the order.

The Evidence Supports the Finding that the Rates Prescribed Are Substantially the Same as Those Existing Prior to the Time These Proceedings Were Instigated.

The Commission found that the rates it prescribed were substantially on the level of those that had previously been voluntarily maintained many years by the railroads. In the report, on reconsideration, of course the Commission did not undertake to recite all the facts but it said "only such essential facts are repeated here as are deemed necessary" (R. 34).

In its first decision on this record, the Commission sets forth (R. 21, 22 and 23) a revenue test based on the movement to Central territory from Birmingham in 1933 and Chattanooga in 1929, comparing the revenue accruing under the rates then in effect with the revenue that would accrue under Scale 2, which was ultimately prescribed by the Commission.

We call the Court's attention to the fact that these figures show that the revenue which accrued under the

rates actually in effect and voluntarily maintained was only a fraction of 1% more than the revenue that would accrue for the same transportation service under the rates ultimately prescribed by the Commission in the order here under attack.

This Court has held in the case of *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229, that the voluntary maintenance of rates over a long period of time is in itself substantial evidence to sustain the Commission's order prescribing those rates for future application. No one in this case has undertaken to maintain that these revenue figures given above are not correct.

The Evidence Supports the Finding that the Rates in Southern Territory Are on Substantially the Same Level as Those Prescribed for Application Within Central Freight Association Territory.

The second finding of fact made by the Commission as a basis for its ultimate finding of fact as to the reasonableness of future rates is that the rates on coke in Southern territory are on approximately the same level as the rates prescribed by it for application within C. F. A. territory (R. 35). This finding is sustained not only by the weight of the evidence but *by all* of the evidence. Witness Behring, who testified for the Southern Railway System, tested the southern level of coke rates from Birmingham and Chattanooga to points in the South by using the rates to all southern destinations having a population of over 5,000, and

showed them to average exactly the same as the Column 2 Scale of rates, which was the scale prescribed by the Commission for application within Central territory (Ex. 3, R. 222). The details of this test are set forth by the Commission in its original report herein (R. 34, 35). Witness Ribe, appearing for this intervener, tested the level of the rates from Alabama producing points to the South by applying to the actual movement of coke during the year 1933 the Column 2 Scale, which was the scale applicable in Central territory, and showed that the freight charges thereon would actually have been 6.55% greater under said Scale 2 than under the rates actually in effect and charged (Ex. 63, R. 362). Witness Widell made a similar test of the movement from Chattanooga to Southern territory from January 1, 1933, to March 31, 1934, and showed that the application of Scale 2 to said movement would have increased the freight charges thereon by 16% (Ex. 35, R. 326).

No evidence was offered to contradict the above-cited evidence and therefore the finding of the Commission that the level of rates on coke in the South was substantially the same as the level of rates prescribed by it for application within Central territory is supported by all of the evidence.

The Evidence Supports the Commission's Finding that Transportation Conditions in Southern Territory, Insofar as the Movement of This Commodity is Concerned, Are Not so Substantially Different From Those in Central Territory as to Justify Higher Rates.

The Commission made definite findings of fact with respect to the question of transportation conditions. It found (R. 36) that coke from the South moved to the Ohio River over the main lines of the carriers reaching said river and that all traffic from the South to Central Territory and the Northwest moves over those lines.

The evidence clearly supported these conclusions and was covered in three exhibits, namely Nos. 70, 71 and 90.

Exhibits Nos. 70 and 71 were introduced by Witness Ribe: 70 shows (1) tons of coke originated by Class One southern carriers; (2) southern carriers reaching southern coke ovens (designated by an "*"), and (3) southern carriers forming reasonably direct routes from coke ovens in Alabama and Chattanooga to the Ohio River (designated with an "o"). The latter carriers are the A. G. S., C. N. O. & T. P., I. C., M. & O., and N. C. & St. L.

Exhibit No. 71 shows that according to a study made by the Commission's Bureau of Statistics and reported in its Statement No. 3120, the cost of handling a car for an average haul of 300 miles is less in the Southern region and on the individual southern roads having reasonably direct routes from southern

coke ovens to the Ohio River, as above named, than in the Eastern district on both gross ton-mile basis and loaded car-mile basis, except (1) that L. & N. cost on loaded car-mile basis is higher than the Eastern District average, and (2) that N. C. & St. L. cost on gross ton-mile basis is higher than the Eastern District average.

Further, it was pointed out (R. 405, 406) that the movements up to the Ohio River are divided, namely, one-half in Tennessee and one-half in Kentucky when from Chattanooga; and one-third in Northern Alabama, one-third in Tennessee and one-third in Kentucky when from Birmingham; and that the traffic density in Kentucky is greater than in Ohio, Indiana, Michigan, Illinois and Wisconsin; and that the traffic density in Tennessee exceeds that in Wisconsin and Michigan, north of Zone A, and is practically the same as in the State of Illinois.

Mr. Behring, for the Southern Railway, testified (R. 238, 239) that the transportation conditions from Chattanooga and Birmingham to the Ohio River were as favorable as those within Central territory, and that the service between Chattanooga and Birmingham and the Ohio River was better than anywhere else in the South or North (R. 240).

Much other evidence as to transportation conditions may be found in the record, but the foregoing is certainly sufficient to constitute substantial evidence of the finding made by the Commission that the transportation conditions affecting coke moving from these southern points are not so substantially

more difficult than those obtaining in Central territory as to justify higher rates.

The Finding of the Commission that Rates Higher Than Those Prescribed Would Restrict, If Not Prevent, the Movement of the Traffic, Is Supported by the Evidence.

We have already discussed the question of the right of the Commission in prescribing just and reasonable rates to consider the effect upon the movement of the traffic, and have shown that the Commission is not only required by Section 15-a (2) to give consideration thereto, but that it has long been established that, irrespective of the statutory requirement, value of service or effect upon movement of traffic is a prime consideration in determining just and reasonable rates.

The finding of the Commission here is as follows:

> "The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to Central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect" (R. 35).

Little can be added to the statement of the Commission that the evidence of the Chattanooga and Birmingham producers, that rates higher than Column 2 rates would further restrict if not prevent the movement of coke from the South to Central territory was not rebutted. There is no claim by appellants

that this evidence was in any way contradicted but the insistence simply is that the Commission erred in considering the matter at all.

CONCLUSION.

Each of the grounds of attack on the order of the Commission, as made by appellants, has been discussed in the foregoing brief and shown to be without justification in law or on the record. Appellants here sought to set up a freight tariff barrier between sections of the country and the Interstate Commerce Commission, by its order, struck down the barrier by prescribing reasonable rates. In doing so that Commission exercised powers specifically vested in it, and its order, being supported by substantial evidence and made after notice and hearing, and there being no irregularity in the proceeding nor error in the application of the rules of law, must be sustained.

It is therefore respectfully submitted that the decree of the District Court, dismissing the bill of complaint, should be affirmed.

Respectfully submitted,

J. V. NORMAN,
Counsel for Alabama Iron & Steel Shippers Conference, Appellee.

HUGH WHITE,
Of Counsel.

Dated at:
Louisville, Ky.,
March 17, 1938.

APPENDIX.

PERTINENT PARTS OF STATUTES REFERRED TO HEREIN.

SEC. 3 (*As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935*) (*U. S. Code, title 49, sec. 3*). (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 15 (*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935*) (*U. S. Code, title 49, sec. 15*). (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in

violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or prac-

tice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts are paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this part, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15a (*Added February 28, 1920; amended June 16, 1933*) (*U. S. Code, title 49, sec. 15a*). (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

SEC. 16a (*Added June 29, 1906*) (*U. S. Code, title 49, sec. 16a*). That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.